

Rule 23B. Motion to remand for findings necessary to determination of ineffective assistance of counsel claim.

(a) Grounds for motion; time. A party to an appeal in a criminal case may move the court to remand the case to the trial court for entry of findings of fact, necessary for the appellate court's determination of a claim of ineffective assistance of counsel. The motion shall be available only upon a nonspeculative allegation of facts, not fully appearing in the record on appeal, which, if true, could support a determination that counsel was ineffective.

The motion shall be filed prior to the filing of the appellant's brief. Upon a showing of good cause, the court may permit a motion to be filed after the filing of the appellant's brief. In no event shall the court permit a motion to be filed after oral argument. Nothing in this rule shall prohibit the court from remanding the case under this rule on its own motion at any time if the claim has been raised and the motion would have been available to a party.

(b) Content of motion; response; reply. The content of the motion shall conform to the requirements of Rule 23. The motion shall include or be accompanied by affidavits alleging facts not fully appearing in the record on appeal that show the claimed deficient performance of the attorney. The affidavits shall also allege facts that show the claimed prejudice suffered by the appellant as a result of the claimed deficient performance. The motion shall also be accompanied by a proposed order or remand that identifies the ineffectiveness claims and specifies the factual issues relevant to each such claim to be addressed on remand.

A response shall be filed within 20 days after the motion is filed. The response shall include a proposed order of remand that identifies the ineffectiveness claims and specifies the factual issues relevant to each such claim to be addressed by the trial court in the event remand is granted, unless the responding party accepts that proposed by the moving party. Any reply shall be filed within 10 days after the response is ~~filed~~ served.

(c) Order of the court. If the requirements of parts (a) and (b) of this rule have been met, the court may order that the case be temporarily remanded to the trial court for the purpose of entry of findings of fact relevant to a claim of ineffective assistance of counsel. The order of remand shall identify the ineffectiveness claims and specify the factual issues relevant to each such claim to be addressed by the trial court. The order shall also direct the trial court to complete the proceedings on remand within 90 days of issuance of the order of remand, absent a finding by the trial court of good cause for a delay of reasonable length.

If it appears to the appellate court that the appellant's attorney of record on the appeal faces a conflict of interest upon remand, the court shall direct that counsel withdraw and that new counsel for the appellant be appointed or retained.

(d) Effect on appeal. Oral argument and the deadlines for briefs shall be vacated upon the filing of a motion to remand under this rule. Other procedural steps required by these rules shall not be stayed by a motion for remand, unless a stay is ordered by the court upon stipulation or motion of the parties or upon the court's motion.

(e) Proceedings before the trial court. Upon remand the trial court shall promptly conduct hearings and take evidence as necessary to enter the findings of fact necessary to determine the claim of ineffective assistance of counsel. Any claims of ineffectiveness not identified in the order of remand shall not be considered by the trial court on remand, unless the trial court determines that the interests of justice or judicial efficiency require consideration of issues not specifically identified in the order of remand. Evidentiary hearings shall be conducted without a jury and as soon as practicable after remand. The burden of proving a fact shall be upon the proponent of the fact. The standard of proof shall be a preponderance of the evidence. The trial court shall enter written findings of fact concerning the claimed deficient performance by counsel and the claimed prejudice suffered by appellant as a result, in accordance with the order of remand. Proceedings on remand shall be completed within 90 days of entry of the order of remand, unless the trial

55 court finds good cause for a delay of reasonable length.

56 (f) Preparation and transmittal of the record. At the conclusion of all proceedings
57 before the trial court, the clerk of the trial court and the court reporter shall immediately
58 prepare the record of the supplemental proceedings as required by these rules. If the
59 record of the original proceedings before the trial court has been transmitted to the
60 appellate court, the clerk of the trial court shall immediately transmit the record of the
61 supplemental proceedings upon preparation of the supplemental record. If the record of
62 the original proceedings before the trial court has not been transmitted to the appellate
63 court, the clerk of the court shall transmit the record of the supplemental proceedings
64 upon the preparation of the entire record.

65 (g) Appellate court determination. Upon receipt of the record from the trial court, the
66 clerk of the court shall notify the parties of the new schedule for briefing or oral argument
67 under these rules. Errors claimed to have been made during the trial court proceedings
68 conducted pursuant to this rule are reviewable under the same standards as the review of
69 errors in other appeals. The findings of fact entered pursuant to this rule are reviewable
70 under the same standards as the review of findings of fact in other appeals.

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